U.S. Department of Labor

Office of Administrative Law Judges
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Case Nos. 2000-LHC-2459
2000-LHC-2460
2000-LHC-2461

OWCP Nos. 5-91967
5-103623
5-107761

In the Matter of

JOSEPH N. DANIELS,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer

Appearances:
Gregory E. Camden, Esq., for Claimant
Jonathan H. Walker, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for permanent total disability from an injury alleged to have been suffered by Claimant, Joseph N. Daniels, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). Claimant alleges that his bilateral knee injuries contributed, through his weight gain, to the aggravation of his pre-existing spinal stenosis which in turn led to permanent total disability, or in the alternative, that he has become permanently and totally disabled due to his bilateral knee injuries.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on March 2, 2001. (TR).[1] Claimant submitted sixteen exhibits, identified as CX 1 through CX 16, which were admitted without objection. (TR. at 17, 42, 87). Employer submitted twenty-one exhibits, EX 1 through EX 21, which were admitted without

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

objection. (TR. at 18, 52, 154, 162, 172). Stipulations were admitted as a joint exhibit, JX 1. (TR. at 17). The record was held open for sixty days in order to conduct post-hearing depositions, and simultaneous briefs were due in ninety days. The time for filing briefs was extended and the record closed on June 20, 2001.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant's back condition is a compensable consequence of his work-related bilateral knee injuries, specifically due to inactivity leading to weight gain;

2. Whether the employment offered to Claimant by Employer constituted appropriate suitable alternate employment based upon Claimant's restrictions;

3. Whether the Employer demonstrated the availability of suitable alternative employment that Claimant could obtain if he diligently tried;

4. Whether Claimant diligently pursued alternative employment;

5. Whether the Employer is entitled to Section 8(f) relief.[2]

STIPULATIONS

At the hearing, Claimant and Employer stipulated:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act;

3. That the Claimant sustained an injury arising out of and in the course of employment to his back on October 18, 1991 [sic January 25, 1991];[3]

4. That a timely notice of injury was given by the employee to the employer;

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[2] There is no application for § 8(f) relief in the record. See footnote 12, *infra*.

[3] Although the written stipulations assert that Claimant's 1991 injury was sustained on October 18, 1991, Counsel advised that correct date is January 25, 1991. *See* (TR. at 24), (CX 2-1).

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That the Claimant's average weekly wage at the time of his injury was $577.93, resulting in a compensation rate of $395.29;

8. That the Claimant was paid compensation benefits as documented by the enclosed LS-208 (sic) dated March 26, 1991;

9. That the Claimant's treating physician for this injury is Dr. Fithian and the employer paid for medical treatment related to this injury;

10. That the Claimant suffered an injury to both his knees on April 15, 1993 arising out of and in the course of his employment;

11. That a timely notice of injury was given by the employee to the employer;

12. That a timely claim for compensation was filed by the employee;

13. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

14. That the Claimant's average weekly wage at the time of this injury was $578.13, resulting in a compensation rate of $385.42;

15. That the Claimant was paid compensation benefits on this injury as documented by the enclosed LS-208 dated September 30, 1999;

16. That Claimant's treating physician for this injury is Dr. Trieshmann and the employer has paid for all medical treatment related to this injury;

17. That the Claimant suffered an injury to his back on August 5, 1997;

18. That a timely notice of injury was given by the employee to the employer;

19. That a timely claim for compensation was filed by the employee;

20. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

21. That Claimant's average weekly wage at the time of this injury was $552.11, resulting

in a compensation rate of $368.07;

22. That the Claimant was never paid any compensation benefits as a result of this injury;

23. That the Claimant was treated by the Newport News Shipbuilding clinic physician for this injury;

24. That the Claimant reached maximum medical improvement on October 5, 1999 for his bilateral knee injury;

25. That the Claimant is not able to return to his pre-injury employment at Newport News Shipbuilding as a result of his bilateral knee injury.

(JX 1).

DISCUSSION OF LAW AND FACTS

It is undisputed that Claimant has worked for Employer for thirty-six years, from 1964 until 2000, beginning when he was eighteen years old. (TR. at 20). Prior to working for Employer, Claimant worked on a farm with his father in North Carolina while he finished school. (TR at 21). When Claimant began working for Employer he was a stage builder, but he later progressed to the job of shipwright. (TR. at 21). A shipwright puts large portions of the ship together with steamboat jacks, shores, and mauls. (TR. at 21-22). Claimant described his job duties as follows:

> Well you would have to get the ship the right width, the right height, and you'd have to cut all of the excess material off. You have to put jacks on it, big long jacks which we call steam boat [sic steamboat] jacks...to pull together and then we have to go up under the unit – what we call a unit, a big unit and put big jacks under it and jack it up so we can move it back to the portion of the ship that it's going to fit to.

(TR. at 22). Much of this work is done by cranes today. (TR. at 22). Claimant worked as a shipwright until 1998. *Id*.

Claimant testified that in 1998, when he was working as a shipwright, his duties included lifting two types of jacks, one weighing approximately 40 to 50 pounds and the other weighing approximately 30 pounds, in addition to lifting shores, "[s]ome of [which were] very heavy." (TR. at 22-23). In addition to this lifting, Claimant testified that he did "a lot of crawling through the units trying to get the right dimensions, the right height, and everything like that." (TR. at 23). Further, he testified that "we would have to go there and cut it and pull it back together and put it in position." *Id*. Finally, Claimant testified that he had to climb incline ladders frequently as well. (TR. at 24).

It has been stipulated that Claimant was injured three times while employed by Employer. (JX 1 at Stipulations 3, 10, 24, & 17). In 1991, Claimant injured his back. (JX 1 at Stipulation 3). Claimant was compensated for this injury. (JX 1 at Stipulation 8). In 1993, Claimant injured both of

his knees. (JX 1 at Stipulation 10). Compensation was also paid for this injury. (JX 1 at Stipulation 15). Claimant reached maximum medical improvement for this injury on October 5, 1999. (JX 1 at Stipulation 24). In 1997, Claimant injured his back, although whether or not this injury occurred during the course of his employment is disputed and no compensation was ever paid. (JX 1 at Stipulations 17, 22). In the Form LS-18, April 29, 1994, August 15, 1993, and August 5, 1997 are listed as the dates of injuries relevant to this dispute.

1991 Injury

Claimant testified that in January of 1991, his back was injured when he was "lifting shores and things trying to get the submarine steamboat jacks ready to pull back to the other unit." (TR. at 24). During this process, Claimant "felt a catch" in his back. *Id.* He was treated at Employer's Clinic following this injury. (CX 2-1). The Clinic treated Claimant and returned him to work with no restrictions. (TR. at 24). Claimant's treating physician for this injury was Dr. Fithian. (JX 1 at Stipulation 9). Dr. Fithian allowed Claimant to return to restricted duty February 21, 1991. At this time, Claimant had the following restrictions: "no bending, climbing or lifting more than 20 pounds." (EX 4- 5). Dr. Fithian continued these light duty restrictions for three more weeks after examining Claimant on February 27, 1991. (CX 8-1),(EX 4-2). Dr. Fithian finally released Claimant to return to regular duty work on March 25, 1991. (EX 4-2). *See also* (TR. at 25)(Claimant's testimony that he returned to his regular duties after this injury). This injury arose out of and occurred in the course of employment and Claimant was paid compensation benefits. (JX 1 at Stipulations 3 & 8).

Knee Injuries, beginning 1993

Claimant initially presented to Employer's Clinic with knee problems in 1993. He noted his date of injury as April 15, 1993. (EX 3-2). He filed a report of occupational injury on August 6, 1993. (EX 3-2). At the Clinic, Claimant saw Dr. J.W. Reid, apparently a doctor at Employer's Clinic,[4] and the diagnosis noted on the form was "bilateral chondromalacia; synovitis on right." (EX 3-2). Claimant testified that, prior to this injury, his duties temporarily changed. There was not enough work available as a shipwright at this time, so Claimant began working as a shipfitter. (TR. at 25). As a shipfitter, Claimant testified that "all that work was done on the floor crawling around, putting pipes together, putting stiffeners on plates and getting them right." (TR. at 25). According to Claimant, he worked in this capacity for about five years. (TR. at 25). Between 1993 and 1999 Claimant saw several doctors for his knee problems, however, ultimately his treating physician for this injury is Dr. Trieshmann. (JX 1 at Stipulation 16), (TR. at 25-26). Claimant's bilateral knee injuries reached maximum medical improvement on October 5, 1999. (JX 1 at Stipulation 24).[5]

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[4] No information regarding Dr. Reid was provided. His Curriculum Vitae is not available and no testimony regarding his interaction with Claimant was given. All that is available is his signature on various portions of Claimant's chart from Employer's Clinic.

[5] Although Employer has presented arguments related to a 1994 injury to the left knee, compensation for such an injury has not been claimed in the instant case. When asked specifically "You're not here today asking me to issue some ruling on an increase in rating on the knees?," counsel for Claimant replied "No, Your Honor, we are

On January 14, 1994, Dr. Reid noted in Claimant's chart: "no prolonged kneeling, crawling or squatting and allow to change position frequently. Make perm." (CX 9-1). Claimant continued to see his family doctor, Dr. Acosta. He also had an appointment with Dr. Greene of Tidewater Orthopaedic Associates, Inc, on May 6, 1994. (EX 5-1). Based upon the referral of Dr. Reid, Claimant also saw Dr. David N. Tornberg.[6] (EX 6-16). Dr. Tornberg released Claimant to regular duty on June 16, 1994. (EX 6-15). Claimant next reported experiencing knee pain during a visit with Dr. Acosta, on October 15, 1996. (CX 10-58). Claimant apparently returned to Dr. Tornberg at this time. (EX 6-3). Dr. Tornberg again released Claimant to regular duty on December 13, 1996. (EX 6-9). *But see* (EX 6-3)(December 12, 1996 office note stating light duty would be beneficial).

Dr. H.W. Trieshmann, Jr.,[7] began treating Claimant in 1997. (CX 5-1), (EX 7-1). In an office note dated November 16, 1998, as an addendum, Dr. Trieshmann noted that Claimant underwent arthroscopy on his right knee in March of 1997.[8] As Dr. Trieshmann understood the situation at this time, Claimant's knee injury was work-related and he had not yet been assigned an impairment rating. Therefore, on November 16, 1998, Dr. Trieshmann wrote:

> The patient has reached maximum medical improvement from his right knee surgery and has limitation of motion, pain and weakness which constitutes a 5% partial permanent impairment of the right lower extremity. It is likely that this condition will deteriorate in the future. Further medical treatment and perhaps surgery will be necessary in the future.

(CX 5-7),(EX 7-6). At the hearing it was not disputed that around 1994 a five percent rating was paid. (TR. at 13). Although Dr. Trieshmann first noted further tearing and degeneration in Claimant's left knee as early as June 13, 1997, Claimant avoided surgery on that knee with medication and steroid injections until April of 1999. *See* (EX 7-9)(operative report for left knee). *See also* (EX 7-1 through 7-8)(Dr. Trieshmann's office notes leading up to the surgery and describing Claimant's treatment).

Eventually, Dr. Trieshmann determined that Claimant's left knee required surgery. Dr.

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not." (TR. at 16). Counsel elaborated "we are not seeking an increase in any disability rating because none has been assessed by a physician as of [March 2, 2001]." *Id. See generally* Claimant's Brief.

[6] Dr. Tornberg is board-certified in orthopaedic surgery and has practiced orthopaedics since 1974. (EX 17-4). Dr. Tornberg is apparently currently employed by Employer and works in their clinic, as his October 5, 1999 note is found in EX 3, Employer's Clinic notes. However, Dr. Tornberg's previous notes, dated 1994 -1995, in evidence at CX 6-1, appear to be from Hampton Roads Orthopaedic Associates, Ltd. Dr. Tornberg's Curriculum Vitae is not available to the court.

[7] Dr. Trieshmann's Curriculum Vitae is in evidence at CX 5-23, 24. Dr. Trieshmann is board-certified in orthopaedic surgery.

[8] There has been no record relating to this surgery put into evidence, however, it is noted in Dr. Acosta's notes dated February 26, 1997 that Claimant is "having arthroscopic surgery R knee. Dr Trieshman[n]." (CX 10-63). The notes for February 28, 1997 state that Claimant was seen by Dr. Trieshmann and note "arthroscopic meniscectomy in near future." (CX 10-63).

Trieshmann preformed surgery on both of Claimant's knees, the last operation occurring in April of 1999.[9] After his final surgery, Claimant remained restricted from returning to work from April 14, 1999 through August 30, 1999. *See* (CX 5-9),(EX 7-26),(CX 5-11),(CX 5-13). As of August 30, 1999, Claimant was available to return to work with temporary restrictions from August 30, 1999 through October 30, 1999. (CX 5-16). It appears that no light duty employment was available within these restrictions at that time. *See* (CX 5-17)(Dr. Trieshmann's office note dated September 24, 1999 noting that Claimant has not returned to work as "the yard did not have light duty fitting his restrictions."). In Employer's physical capabilities form dated September 24, 1999, discussed *infra*, Dr. Trieshmann renewed restrictions for Claimant through November 24, 1999. Claimant finally returned to work on September 28, 1999. (TR. at 27). Again, the parties have stipulated that Claimant reached maximum medical improvement on October 5, 1999 for his bilateral knee injury. (JX 1 at Stipulation 24). Claimant testified that he is not undergoing any physical therapy, that no future surgery is planned, and that Dr. Trieshmann told him to elevate his knees, to keep his legs from swelling. (TR. at 32-33). Claimant testified that he tries to elevate his legs "as often as I can. It's like every 3 hours..." and that elevating his legs helps with his pain. (TR. at 33).

While testifying about his pain, Claimant was asked to focus on the current condition of his knees and not consider his back problems. Claimant testified that, currently, he can not walk and stand for a long period of time. In fact, after standing for 15 minutes, Claimant testified that his knees start to ache. (TR. at 32). When asked how his 1993 knee injury had changed his activities, Claimant testified:

> It changed a lot. ... I wasn't allowed to do the things I normally do. I couldn't do my yard work like I usually do, and in '93 I was walking – doing a lot of walking then, and now I don't totally. ... And normal life and my work is different. ... I can't get out and cut my grass and do like I usually do. I don't walk around the block as much as I usually do, and I don't participate with my family as much as I used to.

(TR. at 35-36). Claimant testified that he does sometimes feel pain when he's active and moving around, but that when he is sitting it does go away. (TR. at 50).

1997 Injury

During the time Claimant was working as a ship fitter, specifically in August of 1997, Claimant suffered a back injury. (JX 1 at Stipulation 17). On that date, Claimant testified that, among other things, he was lifting big pads and putting them together, getting them in position, putting on the brackets. (TR. at 29). During this activity, Claimant's back started to bother him and he went to the Clinic. (TR. at 29). He was sent to therapy and then returned to work with no restrictions. (TR. at 30). It is disputed whether Claimant's 1997 back injury occurred during the course of employment and

[9] Although Claimant testified that his right knee was the last operated on the operative reports indicate that it was in fact his left knee. (TR.. at 27)(Claimant's testimony); (EX 7-12, 13), (EX 7-19, 20)(operative report on left knee dated April 14, 1999). Further, no record of the surgery performed on Claimant's right knee has been made available to the court, although it is briefly mentioned in subsequent medical office notes.

no compensation was ever paid for this injury. (JX 1 at Stipulation 22).

While Claimant named this as a possible issue in his pre-hearing statement and this date of injury is listed on the LS-18, it was not addressed or argued during the hearing or in Claimant's Brief, therefore, there is no basis for this court to consider it.

1999 Injury

On October 5, 1999, Claimant returned to the Clinic complaining of back pain. (TR. at 30). Claimant testified that he went into the Clinic the day after he began experiencing pain, therefore his injury actually occurred on October 4, 1999. *Id.* However, upon cross-examination, Claimant stated that it must have been on September 30, 1999, not October 4, 1999. (TR. at 46). He stated "I need to get my days straight." *Id.* Claimant testified that he had been back to work about two days before he noticed the pain in his back while walking. (TR. at 47). He was having the pain about a day before he saw Dr. Acosta. (TR. at 47). Through his family physician, Dr. Acosta, Claimant eventually went to Dr. Trieshmann's partner Dr. Carlson. (TR. at 31). Dr. Jeffrey R. Carlson[10] is Claimant's treating physician for this condition. The September 30, 1999 date was noted in Exhibit 2 of Dr. Carlson's deposition. *Id*.

As stated, this incident occurred a few days after Claimant returned to work after his 1999 surgery. (TR. at 28). As Claimant describes the incident:

> Well I was leaving work that evening and I went out coming home, I was walking out, and I stepped across a plate, you know...walking out, and I felt a catch in my back. ... I ...coming out of the SPF Shop [within Employer's facility]. ...I just stepped over a stiffner on a plate [and felt the catch in my back]. It just felt like something just tightened up in my back and was, you know, there was pain. As I went to the truck, I had to stop.

(TR. at 28-29). Claimant testified that he was just walking, not climbing any steps or tripping over anything.[11] (TR. at 29). As treatment, Claimant went to physical therapy and has had three injections in his back, the last being in April of 2000. (TR. at 31). Those shots provided Claimant with "some" relief from his back pain. (TR. at 32). It is undisputed that Claimant suffers from spinal stenosis and that this was the reason for his onset of pain in 1999. *See* (CX 8-4),(EX 10-8)(original diagnosis of spinal stenosis, December 13, 1999). *See generally* Claimant's brief; Employer's Brief. Claimant last saw Dr. Carlson in January of 2001, when he was told to come back as needed. (TR. at 32).

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[10] Dr. Carlson is board-eligible in orthopaedics, as he took the test in July and is awaiting the results. (CX 12-3). Dr. Carlson's Curriculum Vitae is in evidence at CX 18-5.

[11] The court notes that Claimant has made no claim that this pain he experienced on the way to his car constitutes a compensable back injury at work.

Spinal Stenosis and § 20(a) Presumption

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the presumption is invoked and the burden shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144; *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988). Further, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte*, 18 BRBS 85. Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982).

In the instant case Claimant alleges that his work-related knee injuries resulted in a prolonged period of inactivity and that he consequently gained a great deal of weight. That weight gain, it is argued, aggravated Claimant's pre-existing and previously asymptomatic spinal stenosis condition. Therefore, Claimant argues that, due to his weight gain, his back problems are a compensable consequence of his knee injuries. (Claimant's Brief at 2).

It is undisputed that Claimant suffers from spinal stenosis and that this condition was the reason for his onset of pain in 1999. *See* (CX 8-4),(EX 10-8)(original diagnosis of spinal stenosis, December 13, 1999). *See generally* Claimant's Brief; Employer's Brief. It is also undisputed that Claimant suffered work-related bilateral knee injuries in 1993. (JX 1 at Stipulation 10). Claimant has presented

his own testimony and the opinion of Dr. Trieshmann to establish his *prima facie* case and invoke the presumption. Claimant testified that as he was leaving work, walking to his car, "it just felt like something just tightened up in my back and was, you know, there was pain." (TR. at 28-29). Further, as discussed *supra*, Claimant testified that since his knee injury his lifestyle has changed, becoming more inactive. (TR. at 32, 35-36, 50).

In addition to his own testimony, Claimant relies on the opinions of Dr. Trieshmann and Dr. Carlson. In a letter to Claimant's attorney Dr. Trieshmann writes that Claimant's knee injuries contributed to "an inactive lifestyle which would result in excessive weight gain." (CX 5-22),(EX 16). He further stated: "[c]learly inactivity and weight gain can aggravate a pre-existing degenerative and/ or hereditary condition such as spinal stenosis." *Id.* Dr. Carlson also wrote a letter dated September 25, 2000 addressing this issue, in which he also opined that "L3-4 spinal stenosis can be related to [Claimant's] work injuries." (EX 10-21). However, when asked about that statement in his deposition, he testified:

> I think you're in a difficult situation. Spinal stenosis is caused by life. Work is part of life. Can it be related to work injuries? Yes. Can it not be related? Yes. It's a hard question.

(CX 12-13). Dr. Carlson's letter and Dr. Trieshmann's letter, taken with Claimant's testimony regarding his change in lifestyle, while marginal, will be treated as sufficient to invoke the presumption. Thus it is presumed under § 20(a) that Claimant's bilateral knee injuries contributed to his weight gain which in turn aggravated his pre-existing spinal stenosis, therefore making the aggravation of his spinal stenosis a compensable consequence of his bilateral knee injuries.

Rebuttal of 20(a) Presumption

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's condition was not caused or aggravated by his employment. *Rajotte*, 18 BRBS 85 (1986). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the

causation issue based on the record as a whole. *Kier*, 16 BRBS at 129; *Devine v. Atlantic Container Lines, G.T.E., et. al.*, 25 BRBS 15, 21 (1991). When the evidence as a whole is considered, it is the proponent (Claimant) who has the burden of proof. *See Director, OWCP v. Greenwich Colleries,*114 S.Ct. 2251, 28 BRBS 42 (CRT) (1994).

To rebut the Section 20(a) presumption Employer offers the deposition testimony of Dr. Tornberg. Although Employer's counsel apparently agrees with Dr. Trieshmann's statement that spinal stenosis can be aggravated by obesity (TR. at 8), he argues that in this case Claimant's diagnosis of "morbid obesity" preceded his knee injuries. In his brief Employer's counsel argues "Claimant's back pain is attributable to spinal stenosis. The Claimant's spinal stenosis was neither caused by nor made materially worse by any condition at work." (Employer's Brief at 14).

Employer relies on the opinion of Dr. Tornberg, that Claimant's spinal stenosis is an "ordinary disease of life" and that it is not occupationally related. (EX 17-6). *See also* (EX 17-14, 15)(reiterating his opinion that Claimant suffers spinal stenosis and that the condition is not occupationally related, rather it is an ordinary disease of life). Further, after reviewing Claimant's medical records from Dr. Trieshmann, Dr. Carlson, and Dr. Acosta, as well as Dr. Carlson's deposition, discussed *infra*, Dr. Tornberg again opined that spinal stenosis is an ordinary, progressive disease of life. He further stated that Claimant's knee injury did not contribute to his pain while walking therefore making his back condition more symptomatic, that it was completely unrelated. (EX 17-7-9).

Dr. Tornberg was also asked about Claimant's obesity and whether or not his weight gain caused, aggravated or accelerated Claimant's spinal stenosis. Dr. Tornberg testified that while obesity may have a loose association with mechanical or muscular back pain, it does not have a relationship with spinal stenosis. Specifically, he testified:

> Well, here's the issue, and I think it's important to differentiate these things. Causation is a very specific entity. Association is the more common thing that we see. Overweight people and back pain. There's an association, but there's, you can't conclude that the back pain is caused by simply being overweight no more than you can conclude that because many people with back pain have brown eyes that brown eyes cause back pain. They're a loose association. In the case of spinal stenosis, however, it is a degenerative disease of the spine. It is unrelated to obesity, the condition itself. It is a narrowing of the outlet in the spine that the nerve has to pass. It's progressive, and consequently will irritate the nerve. And the pain of spinal stenosis and that condition and its subsequent long-term effect should be differentiated from that of simple, mechanical common back pain. ... Spinal stenosis is not a muscular condition, no. It is a narrowing, if you will. ...

(EX 17- 9, 10, 11). Dr. Tornberg's unequivocal deposition testimony constitutes substantial evidence affirmatively severing the causal connection between Claimant's knee injuries, weight gain, and his spinal stenosis, therefore the § 20(a) presumption is rebutted.

Weighing the Evidence

Once the presumption of causation has been successfully rebutted, "the presumption no longer controls and the issue of causation must be resolved based on the evidence as a whole." *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 16, 20-21 (1990). This is what is commonly referred to as the "bursting bubble" theory of the Section 20 (a) presumption. *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978). Therefore, the claimant must show, by a preponderance of the evidence, that his employment caused, contributed to or aggravated his condition. In attempting to meet this burden, Claimant is not entitled to the so-called "benefit of the doubt rule." *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

When a claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. *See generally Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Further, if there is a natural progression, or an injury that is the natural and unavoidable consequence of a previous injury it is also compensable. *See Merrill*, 25 BRBS at 144-45. The basic rule of law in "direct and natural consequences" cases is succinctly stated in *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." *See also Bludworth Shipyard v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, *modified and reh'g denied*, 657 F.2d 665 (5th Cir. 1981); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981);1 A. Larson WORKMEN'S COMPENSATION LAW § 13.00 at 3-502 (1992).

Claimant's contention that his weight gain was, essentially, a natural and unavoidable consequence of his knee injuries and that that weight gain aggravated his spinal stenosis, is tenuous. In his testimony, Claimant agreed that his weight fluctuated prior to his knee injury as well as after. (TR. at 48). The medical evidence supports this statement. Claimant's records, including his weight, are in evidence from 1980 through the present. Claimant's weight has not been below 300 pounds since March 30, 1988. (CX 10-13)(EX 8A-13). *See generally* (CX 10), (EX 8A). Around the date that Claimant reported his occupational knee injury, August 6, 1993, Claimant's weight was around 339 pounds. *See* (CX 10-33),(EX 8A-30)(documenting Claimant's weight as 339 pounds on August 10, 1993); (CX 10-33),(EX 8A-33)(documenting Claimant's weight as 342 pounds on July 12, 1993). Claimant has weighed in excess of 350 pounds since August 5, 1996. (CX 10-57). *See generally* (CX 10), (EX 8A). When finally weighed by a dietician in July of 2000, Claimant weighed 434 pounds. (CX 13-1).

Even if it is accepted that Claimant's knee injuries contributed to his weight gain, Claimant has not put forth sufficient evidence to prove by a preponderance of the evidence that his obesity aggravated or accelerated his spinal stenosis. In support of this proposition, Claimant offers the somewhat conditional testimony of Dr. Carlson and a brief letter from Dr. Trieshmann. Both Dr.

Trieshmann and Dr. Carlson state that, generally, obesity "can" aggravate spinal stenosis, however, neither of them specifically or affirmatively relate Claimant's post-knee injury obesity with an aggravation of his underlying condition. All of the medical evidence offered states, however, that spinal stenosis is a degenerative disease of life.

Dr. Carlson agreed that Claimant's "age and morbid obesity are also consistent with spinal stenosis or an arthritic condition." (CX 12-16). He stated that he did not think there was " a specific correlation between obesity and spinal stenosis, but all the strain you put on your back can lead to spinal stenosis." *Id.* He explains that obesity can put a strain on the spine because "[u]sually the weight of your abdomen on your spine does make your spine a little less stable." *Id.* Dr. Carlson also testified about the role of walking and working in Claimant's condition, reiterating his opinion that spinal stenosis comes from life. He elaborates:

> The symptoms of spinal stenosis may be aggravated by work activity, yes. Does it come from work? We can't make that judgment. It comes from life. Working is part of life. I can't say that his spinal stenosis may not have happened if he didn't do a specific job. Are there more shipfitters that have spinal stenosis than other patients? I don't think so.

Id. There are no studies that say people in heavy manual labor have more spinal stenosis than people in the general population. *Id.* Finally, the following exchange occurred:

> Q: Now, you said working could cause–did you say flare-ups? What was the word you used?
>
> A: Aggravation.
>
> Q: When you use the word aggravation, am I correct [in assuming that] you're talking about a temporary process linked to the activity such that when the activity ceases the aggravation of the symptoms should cease after a short period of time?
>
> A: We would like to think so. It's not always the case.
>
> Q: All right. In this case, there's no evidence that the underlying process itself was made materially worse by any work activity, is there?
>
> A: It looks like the walking is what sort of started his symptomology.
>
> Q: Would you expect that when he stops walking he would stop having an aggravation of symptoms?
>
> A: That's not entirely true no.

> Q: So in your opinion – let me separate this between the underlying process and the aggravation. There's no evidence that the underlying process was made any worse by work activity?
>
> A: Right.
>
> Q: The only basis you have for believing that the walking precipitated symptoms that would have prolonged in nature would have been his history?
>
> A: Yes.
>
> Q: That's the only thing you have to rely on for that?
>
> A: Absolutely. ... According to my notes I don't have anything that says why it [Claimant's symptomology] started. I have to go on the other information that said, yes, it started by walking.

(CX 12- 8 through 11). Dr. Carlson also wrote that, while Claimant's condition may have been aggravated by his work, it is difficult to separate the two. (EX 10-22). Finally, when asked about the causes of spinal stenosis, Dr. Carlson testified:

> Usually it's arthritic changes or instabilities in the spine that causes that. Most of the time it's caused from an arthritic process, but we don't know all the answers.
>
> Q: What brings on the arthritic processes?
>
> A: Life. Everyone has arthritis. It's just from being alive.
>
> Q: There's nothing else that makes it come on faster or slower in individuals?
>
> A: There's some genetic predispositions to arthritis, but spinal stenosis in general is not caused by those.

(CX 12-12, 13). Dr. Carlson did not, in any part of his deposition testimony affirmatively state that, in this specific case, Claimant's weight or work activities led to an aggravation of his spinal stenosis. Rather, he testified in generalities and speculations. *See* (CX 12-12) (discussing Claimant's previous back strains stating "We all have back strains. Can it speed up stenosis? It's very had to say whether or not anything would speed up a stenotic problem."), (CX 12- 8 through 11)(discussing Claimant's walking and onset of symptoms, discussed fully *supra*).

Dr. Trieshmann's entire opinion concerning the possible relationship between Claimant's spinal stenosis and his weight gain is contained in a letter dated December 7, 2000. In that letter he writes:

> I have reviewed the information which you have provided to me and it is clear that [Claimant's] knee injuries and the required treatment, rehabilitation and permanent impairment have contributed to a very inactive lifestyle which would result in excessive weight gain. Stated another way, his knee injuries contributed to his restrictions and reduced physical activities which has contributed to his significant weight gain.
>
> With regard to the second issue relating to the relationship of the weight gain to the spinal stenosis, I have little to add. Clearly inactivity and weight gain can aggravate a pre-existing degenerative and/ or hereditary condition such as spinal stenosis.

(CX 5-22),(EX 16).

In addition to the somewhat equivocal testimony of Dr. Carlson and the brief, generalized opinion of Dr. Trieshmann, the medical records and deposition testimony of Dr. Tornberg must also be considered. Dr. Tornberg is the only doctor to have examined Claimant for both his back pain and his knee injuries. *See* (CX 6-1)(Claimant's initial visit to Dr. Tornberg concerning his knees), (EX 3-8)(Dr. Tornberg's office note); discussion *infra* regarding Dr. Tornberg's Deposition (EX 17-13, 14)(discussing the language of the note and its significance). Dr. Tornberg unequivocally testified that Claimant's back pain and symptoms of stenosis were not related to his knee injuries which had resolved. (EX 17-7 through 17-9). Regarding Claimant's obesity, the following exchange occurred:

> Q: Are you aware that [Claimant] had weight gain between 1994 and when you saw him in the year 2000?
>
> A: When I saw him I did not know that. He is morbidly obese, it was clear that he was, and that he did have really excessive weight gain. I did not know the specifics of incremental weight gain over his life; it's a life-long process. I've subsequently reviewed Dr. Acosta's records that demonstrate that he, you know, clearly has had long-standing morbid obesity and that there have been changes in his weight over that period.
>
> Q: Can – if you assume, for the sake of argument, that obesity can cause or somehow materially worsen spinal stenosis, assuming that for the sake of argument, can someone who is obese to begin with and becomes more obese be at any greater risk for suffering spinal stenosis?
>
> A: Well, here's the issue, and I think it's important to differentiate these things. Causation is a very specific entity. Association is the more common thing that we see. Overweight people and back pain. There's an association, but there's, you can't conclude that the back pain is caused by simply being overweight no more than you can conclude that because many people with back pain have brown eyes that brown eyes cause back pain. They're a loose association. In the case of spinal stenosis, however, it is a degenerative disease of the spine. It is unrelated to obesity, the condition itself. It

> is a narrowing of the outlet in the spine that the nerve has to pass. It's progressive, and consequently will irritate the nerve. And the pain of spinal stenosis and that condition and its subsequent long-term effect should be differentiated from that of simple, mechanical common back pain. And common back pain can be aggravated by a weak – it can be aggravated on occasion by deconditioned individuals who are obese. ... Spinal stenosis is not a muscular condition, no. It is a narrowing, if you will. It would be just like if you put a block in a tunnel, and where two cars can get through, now only one can. The problem that we get into with obesity and back pain, as I say, it's an association. And when we talk about that, we talk about mechanical back pain, and we talk about people having a naggy back because they're obese. It's an attractive target to blame on, and probably has some association with mechanical intermittent back pain. It's not the cause of the back pain, it's what makes the back pain more difficult. And it also remits. And we have to remember that very thin people have both back pain and spinal stenosis in the absence of obesity. So that's why I point out it's a loose association.

(EX 17- 9, 10, 11). Dr. Tornberg further testified that, while originally he assumed Claimant's back pain was due to his morbid obesity, once he received Dr. Carlson's diagnosis of spinal stenosis his opinion was refined. He testified, "I feel the spinal stenosis is the likely cause of his current back pain and will be a cause for future back pain." (EX 17-14, 15).

The medical evidence is consistent in characterizing spinal stenosis as a progressive and degenerative disease that occurs in ordinary life. *See* (CX 12-8)(Dr. Carlson's opinion), (EX 17-14, 15)(Dr. Tornberg's opinion),(CX 5-22)(Dr. Trieshmann's opinion). Therefore, Claimant's knee injuries and work activities were not a cause of his condition. Further, given Claimant's history of obesity, this court can not find that his weight gain after 1994 was a "direct and natural consequence" of his knee injuries. Although Claimant did testify that his lifestyle changed after his knee injuries (TR. at 32, 35-36, 50), he also testified that his weight fluctuated prior to his knee injuries. (TR. at 48).

Even if Claimant's knee injuries did contribute to his weight gain, however, the medical evidence supporting a connection between his weight and the spinal stenosis is unconvincing. Considering the opinions of Drs. Carlson and Trieshmann in their entirety regarding the effect of Claimant's weight on his spinal stenosis, namely whether or not it aggravated this underlying degenerative condition, I find them to be generalized and equivocal and therefore insufficient to carry Claimant's burden of proof. Further, I find Dr. Tornberg's clear and definitive testimony regarding obesity and the nature of spinal stenosis persuasive. (EX 17-9, 10, 11).

Accordingly, considering all of the medical evidence presented by Claimant and Employer, in addition to Claimant's testimony, I find that the preponderance of the evidence does not establish that Claimant's spinal stenosis back problems are causally related to his weight gain. Therefore, I find that

the Claimant's spinal stenosis is a personal condition and is not work-related.[12]

Bilateral Knee Injuries

Claimant has also alleged that his bilateral knee injuries have left him permanently and totally disabled. *See* Claimant's Brief at 32. Specifically, Claimant testified that the job he returned to after his 1999 surgery was not within his restrictions and therefore did not constitute suitable alternate employment. *Id.* Since it has been stipulated that Claimant did suffer a work-related bilateral knee injury that did not reach maximum medical improvement until October 5, 1999, the only issue left to be decided in this case is the nature and extent of that disability.

Under *Potomac Electric Power Comp. v. Director, OWCP*, 449 U.S. 268, 101 S.Ct. 509 (1980)(hereinafter "PEPCO"), a claimant is limited to the statutory schedule of payment for a scheduled injury. *See PEPCO,* 101 S. Ct. at 512-13. Therefore, unless a claimant is found to be permanently and totally disabled, he can recover no more than the schedule allows, no matter what his actual wage-earning loss. Claimant in this case concedes that if the court finds his spinal stenosis to be unrelated to work activity (as has occurred) he is not entitled to additional compensation unless he is found to be permanently and totally disabled, completely lacking in wage-earning capacity, as a result of his bilateral knee injuries. (TR. at 16-20).

A claimant has the burden of proving the nature and extent of his disability without the benefit of the § 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once a claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable alternative employment is shown. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Co.*, 17 BRBS 156 (1985).

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[12] This finding renders a decision on Employer's § 8(f) claim unnecessary, however, the court again notes that no Section 8(f) application was submitted into evidence for consideration. Further, obesity has not been recognized as a pre-existing disability for § 8(f) purposes. *See Brogden v. Newport News Shipbuilding & Dry Dock Co.*, 80-LHC-2098 (August 17, 1981). *See also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 80-LHC-564 (August 7, 1980) (holding that the claimant's breathing difficulties caused by obesity, and not the obesity in and of itself, was a permanent partial disability which satisfied the requirements of § 8(f)).

Nature of Disability (Permanent vs. Temporary)

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982); *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). A claimant's condition may, however, deteriorate after maximum medical improvement. *See Davenport v. Apex Decorating Co.*, 18 BRBS 194, 197 (1986); *Leech v. Service Eng'g Co.*, 15 BRBS 18, 22 (1982). It is undisputed in the instant case that Claimant suffers a permanent disability, the dispute is over the extent of that permanent disability. (TR. at 13)(parties do not dispute the fact that a permanent disability rating was paid in 1994). *See generally* Claimant's Brief; Employer's Brief.

Extent of Disability (Total vs. Partial)

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

It has been stipulated in this case that Claimant cannot return to his regular or usual employment as a result of his bilateral knee injury. (JX 1 at Stipulation 25). Therefore, Claimant has established his *prima facie* case of total disability. The burden now shifts to Employer to demonstrate the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

Suitable Alternate Employment

An employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 224 (1986). Alternatively, an employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

If an employment-related injury contributes to, combines with, or aggravates a pre-existing

disease or underlying condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. *See Bludworth Shipyard v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). *See also Carlson v. Bethlehem Steel Corp*., 8 BRBS 486 (1978) (benefits were denied as the aggravation of claimant's arthritic condition by a work-related injury caused only a temporary recurrence of the symptoms rather than a worsening of the underlying condition). However, if claimant's subsequent injury is not found to be caused or aggravated by a work-related injury the employer will not be liable for the resultant additional disability. *See Marsala v. Triple A South and Assoc. Indemnity Corp*., 14 BRBS 39 (1981); *Arnold v. Nabors Offshore Drilling, Inc*., 35 BRBS 9 (2001)(per curiam).

If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The claimant's diligence is relevant only after the employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 687.

Claimant was first affirmatively diagnosed with spinal stenosis on December 13, 1999, after testing on December 8, 1999. (EX 10-7),(CX 8-4) (Dr. Carlson's office note dated December 13, 1999); (EX 10-8)(reporting the results of Claimant's December 8 tests). It is noted, however, that, as early as November 23, 1999, Dr. Carlson noted that Claimant suffers from a degenerative disc disease. (EX 10-6). Dr. Carlson listed spinal stenosis as a possibility on October 4, 1999. (EX 10-1),(CX 8-3)(Dr. Carlson's office note dated October 4, 1999). However, since it has been determined that Claimant's back condition, spinal stenosis, was not caused or aggravated by a work-related injury, it must be treated as a second injury due to an intervening cause.

In cases involving second injuries due to intervening causes, only the restrictions relating to the claimant's work-related injury will be considered in establishing the extent of his disability and the availability of suitable alternate employment. *See e.g. Marsala v. Triple A South and Assoc. Indemnity Corp*., 14 BRBS 39 (1981); *Arnold v. Nabors Offshore Drilling, Inc*., 35 BRBS 9 (2001)(per curiam).

Therefore, only Claimant's restrictions regarding his knee injuries will be considered in assessing suitable alternate employment.

Work Restrictions Due to Claimant's Knee Injuries

As stipulated, Claimant reached maximum medical improvement for his bilateral knee injury on October 5, 1999. (JX 1 at Stipulation 24). Claimant agrees that Employer has paid all necessary compensation for his knee injuries up until October 5, 1999. (TR. at 10-11). No new disability rating had been assessed as of the hearing date, March 2, 2001. (TR. at 16). As stated *supra*, a claimant's condition can deteriorate after the date of maximum medical improvement. *See Davenport v. Apex Decorating Co.*, 18 BRBS 194, 197 (1986); *Leech v. Service Eng'g Co.*, 15 BRBS 18, 22 (1982). Therefore, we must examine Claimant's work restrictions at the time he returned after to work after his surgery in addition to any continuing restrictions assigned to his knees.

Claimant received permanent restrictions, apparently for his knees, from Dr. Reid of Employer's Clinic, on January 14, 1994. Dr. Reid made the following notation in Claimant's chart: "change to read no prolonged kneeling, crawling or squatting and allow to change position frequently. Make perm." (CX 9-1). After seeing both Dr. Greene and Dr. Tornberg, Claimant received additional temporary restrictions. Then, in a work restriction evaluation dated May 27, 1994, Dr. Tornberg restricted Claimant from squatting and kneeling. (EX 6- 16). In a note from Claimant's medical records with Employer, dated June 15, 1994, signed by Dr. J.W. Reid, he writes "knees minimally symptomatic now. MRI essentially negative. ... Dr Tornberg tomorrow... (perm.). Keep kneeling to minimum. Allow to stretch legs frequently." (EX 3-14). In a work restriction evaluation form dated June 16, 1994, Dr. Tornberg released Claimant to regular duty. (EX 6-15).

Claimant continued to seek treatment for his knee pain from Dr. Tornberg. On December 12, 1996, Dr. Tornberg wrote:

> MRI shows degenerative changes, no frank tearing in the meniscal structures of the right knee. He has persistent pain and discomfort in both knees and a small Baker's cyst palpable on the posterolateral aspect of the left knee. Findings compatible with severe chondromalacia and degenerative arthritis, early. This is markedly aggravated by his exogenous obesity. Recommended guarded activity; light duty would be beneficial to avoid repetitive squatting and kneeling; weight loss is essential.

(EX 6-3).

In 1997, as discussed above, Claimant began to see Dr. Trieshmann for his knee pain. Although there is no record in evidence reflecting the fact, according to a later notation Claimant had arthroscopic surgery on his right knee in March of 1997. (CX 10-63). *See* discussion *supra* note 8. Subsequently, Claimant was released to regular duty on April 27, 1997, by Dr. Trieshmann. (EX 7-21). Claimant was allowed to continue his "usual duties" at work at this time. (CX 5-3),(EX 7-1).

Claimant continued to have problems with his knees, however, and his left knee ultimately required surgery. In a work release dated November 24, 1998, Claimant was released for regular duty as of November 30, 1998. He was excused from work by Dr. Trieshmann from November 23, 1998

through November 30, 1998. (EX 7-23). *See also* (EX 7-24)(work release for February 17 1999). After his left knee surgery in April of 1999, Dr. Trieshmann saw Claimant about once a month to assess his condition. Ultimately, Dr. Trieshmann restricted Claimant from working at all until August 24, 1999. *See* (EX 7-26) (note dated April 19, 1999, directing Claimant to remain out of work for two weeks); (CX 5-11, 12), (EX 7-13) (note dated May 6, 1999 restricting Claimant from working for four weeks); (CX 5-13),(EX 7-13, 27) (prescription dated June 2, 1999, restricting Claimant from working for four weeks); (CX 5-16)(temporary light duty restrictions for Claimant from August 30, 1999 to October 30, 1999).

During Claimant's June 2, 1999 appointment with Dr. Trieshmann, he noted that his right knee was beginning to give him difficulty. Dr. Trieshmann specifically noted that, at this time, Claimant's left knee is improving, "getting along very well." Dr. Trieshmann determined that Claimant needed physical therapy for his right knee as well as his left. Again, Claimant was unable to return to work. (CX 5-12). *See* (CX 5-13),(EX 7-13, 27) (prescription dated June 2, 1999, restricting Claimant from working for four weeks). Returning on June 17, 1999, Claimant got the results of some tests and continued to complain of swelling in his legs. Dr. Trieshmann stated that he felt the "most appropriate treatment would be continued elevation and rest" along with physical therapy. (CX 5-14),(EX 7-14) (emphasis added). Again, Claimant was unable to return to work. *Id.* Claimant returned on July 9, 1999. According to this note:

> [Claimant's] left knee is coming along quite well. His right knee however continues to give him trouble posterolaterally. His therapy is going well but the therapists have recommended hydrotherapy. ... He is still unable to return to work. Hopefully at his next visit light duty will be available for him with restricted climbing, walking, standing, stooping.

(CX 5-14),(EX 7-14). On August 10, 1999, Dr. Trieshmann treated Claimant with a steroid injection and continued his restriction against working for two weeks. After that two weeks, Dr. Trieshmann states "[h]opefully at that time he will be ready to return to light duty at work." (CX 5-15),(EX 7-15).

In an office note dated August 26, 1999, Dr. Trieshmann stated that, at that time, Claimant's "principal symptoms seem to be coming from his right leg...." According to Dr. Trieshmann, the "steroid injection didn't help him much." At this time, Dr. Trieshmann stated: "I think the most appropriate course at this time would be to return him to work with restricted duties and this is provided today." (CX 5-15). Dr. Trieshmann issued temporary restrictions for Claimant from August 30, 1999 to October 30, 1999 on this form dated August 25, 1999. (CX 5-16). Dr. Trieshmann restricted Claimant's lifting to 25 pounds, not to be carried more than 100 feet. He also restricted Claimant's climbing of stairs to only those to and from the job site and completely restricted his ability to climb vertical or inclined ladders. Claimant was also restricted completely from crawling, kneeling, and squatting. He was restricted to occasional (1-2.5 hours) of standing. Claimant's bending and twisting were not restricted. (CX 5-16),(EX 7-15, 30).

In a physical abilities form from Employer, dated September 24, 1999, Claimant was issued

restrictions from September 24, 1999 through November 24, 1999. He was restricted from lifting over 25 pounds and that weight could only be carried 100 feet. He was totally restricted from climbing vertical or inclined ladders, crawling, kneeling, and squatting. He was limited to climbing stairs to only what was necessary to get to and from job site. He was also limited to occasional (1-2.5 hours) of standing. The signature is illegible. (EX 7-32).

After his back became symptomatic, Claimant began seeing Dr. Carlson, as discussed *supra*. Dr. Carlson issued Claimant temporary work restrictions dated November 5, 1999. These restrictions included a designation of light duty, a complete restriction on bending and a limit of 20 pounds on lifting. (CX 8-2).

According to Dr. Trieshmann's November 5, 1999 office note:

> [Claimant's] knee situation is about the same. Apparently a light duty was available for him within the restrictions for his knees but his back problem is such that he is unable to work.
>
> His knee exam is unchanged today and I have nothing to add regarding his knees.
>
> His work restrictions regarding his knees are the same.

(CX 5-17), (EX 7-16). In a work status slip dated November 5, 1999, and signed by Dr. Trieshmann, Claimant was instructed to return to light duty work on November 8, 1999, with no bending and no lifting more than 20 pounds. (EX 7-34),(EX 10-5). In a work restriction form provided by Employer and filled in by Dr. Trieshmann, dated and beginning November 8, 1999 through a date "to be determined," Claimant was limited to lifting 20 pounds, for a maximum distance of 100 feet. He was also totally prohibited from bending. (CX 5-18),(EX 7-33).

Regarding Claimant's back injury, Dr. Carlson also issued work restrictions. In a Supplemental Disability Report to Aetna dated November 23, 1999, Dr. Carlson reported that Claimant returned to work on October 26, 1999. Claimant's current condition and diagnosis was noted to be degenerative disc disease. Claimant first consulted him on October 4, 1999 and he was seen again on October 12, 1999 but no other appointments were scheduled. Claimant was released to work with light duty restrictions of no bending and no lifting more than 20 pounds. Finally, Claimant was noted to be continuously totally disabled, or out of work from October 5, 1999 thru October 26, 1999. (EX 10-6). On January 31, 2000, Dr. Carlson issued a work status restriction form for Claimant stating that he should return to work on February 7, 2000 in a light duty capacity with limited standing and no lifting of more than 20 pounds. (EX 10-11). In a work status slip that appears to be dated March 14, 2000, although the date below it is April 14, 2000, Dr. Carlson releases Claimant to work light duty with limited standing and climbing, and a limit of 20 lbs on lifting. (CX 8-6),(EX 10-12).

In a form dated April 11, 2000, Dr. Carlson issued temporary duty restrictions for Claimant to last three months. Claimant was totally restricted from climbing vertical or inclined ladders. He was

restricted to only frequent (2.5-5.0 hours) climbing of stairs. He was limited to lifting 20 pounds. He was totally restricted from crawling, kneeling, squatting, bending, or twisting. Finally, he was restricted to frequent (2.5-5.0 hours) standing and occasional (1-2.5 hours) work above his shoulders. The notation also appears to say avoid repetitive motion of lumbar spine. (EX 10-13).

In a form for work restrictions dated July 10, 2000, Dr. Carlson issued temporary duty restrictions for Claimant to last three months. Claimant was totally restricted from climbing vertical or inclined ladders. He was restricted to only frequent (2.5-5.0 hours) climbing of stairs. He was limited to lifting 20 pounds. He was totally restricted from crawling, kneeling, squatting, bending, or twisting. He was restricted to frequent (2.5-5.0 hours) standing and occasional (1-2.5 hours) work above his shoulders. Again there is a notation that appears to say avoid repetitive motion of lumbar spine. (EX 10-13).

Dr. Carlson again examined Claimant on July 25, 2000 and established a disability rating. He wrote:

> [Claimant] has symptoms of low-back pain and also deep tendon reflexes, as well as spinal stenosis seen on his MRI scan, which placed him in DRE lubosacral category 3 radiculopathy with a 10% whole body impairment.

(CX 8-10),(EX 10-18). Also, in a letter dated September 25, 2000, Dr. Carlson wrote "Claimant's current treatment includes an exercise program which he has learned through the physiatrist, as well as lifting restrictions of no greater than 40 lb." (EX 10-21). As Employer points out in his brief, however, there is a discrepancy between this forty pound restriction and his later indications of a twenty pound limitation. *See* Employer's brief at 8 (citing EX 10-21; EX 10-19; EX 10 -20).

In a letter dated October 6, 2000, Mr. DeMark, a certified Rehabilitation Counselor, asked Dr. Carlson if his "light restrictions, with no lifting of over twenty pounds, limited standing and limited climbing" were still in effect. Dr. Carlson indicated that they were. (CX 8-11),(EX 10-19). In a separate form, also dated October 6, 2000, Dr. Carson issued restrictions for 3 months. Those restrictions included: no lifting over 20 pounds; no climbing on vertical or inclined ladders, allowed frequent (2.5-5.0 hours) climbing of stairs; no crawling, kneeling, squatting, bending or twisting; allowed for frequent (2.5-5.0 hours) standing; and only occasional (1-2.5 hours) work above shoulders. There is also a partially illegible handwritten notation to avoid some type of repetitive motion. (CX 8-12).

In a form from Mr. DeMark dated October 16, 2000, Dr. Carlson indicated that Claimant could perform the following activities: continuous sitting for up to eight hours a day; and intermittent walking, lifting, bending, squatting, climbing, kneeling, twisting and standing for one hour a day. Dr. Carlson indicated that Claimant's lifting restriction should be 10-20 lbs. Dr. Carlson also indicated that Claimant could work eight hours a day. Claimant was released to reach or work above the shoulder, use his feet to operate foot controls or for repetitive movement, and operate any type of motor vehicle. Finally, Dr. Carlson indicated that he anticipated Claimant would need vocational rehabilitation services. Claimant had reached maximum medical improvement for his spine and been assigned a 10%

permanency rating. All other indications were normal. (CX 8-13),(EX 10-20).

Regarding Claimant's knees, Dr. Trieshmann filled out a form entitled "Physical Capacities Evaluation" dated October 17, 2000 for Claimant. This form indicated that Claimant could stand or walk for a total of 2 hours in a work situation allowing for periodic breaks to rest. According to Dr. Trieshmann, Claimant could not stand or walk as long as 2 hours without an opportunity to sit. Claimant could sit for as much as 7 or 8 total hours if a "sitting job could be obtained allowing the patient to shift sitting positions as necessary and occasionally stand (for a few minutes per hour)." (CX 5-20). Claimant could sit for a total of 2 hours "shifting sitting positions but not being able to stand." Claimant could work for a full 8 hours if he could change from sitting to standing at will. *Id.* Dr. Trieshmann was also asked to address the weights Claimant could carry or lift. He indicated that Claimant could "occasionally" lift or carry weights from 0-20 pounds, however, weights from 20 to 50 pounds were not to be lifted or carried at all. (CX 5-20). Dr. Trieshmann was asked to "[d]escribe any chronic limitation of motion, swelling, or loss of function of...legs, ankles, feet." He indicated Claimant's "knees 0 -> 100" degrees, indicating both right and left knees. He also indicated that it is necessary for Claimant, during an 8 hour work day, to elevate his legs or feet for 30 minutes every 3 hours.[13] Claimant's arms, shoulders and hands were not noted to be impaired. *Id.* (emphasis added). When asked to describe if pain is present, Dr. Trieshmann wrote "refer to Dr. Carlson." All other indications on the form were normal. (CX 5-20,21).

On January 10, 2001, Dr. Carlson established permanent restrictions for Claimant in a form provided by Employer. On this form Dr. Carlson indicated that Claimant was restricted to:

> lifting 20 pounds; restricted to no climbing of vertical or inclined ladders; allowed frequent (2.5-5.0 hours) climbing of stairs; restricted to no crawling, kneeling, squatting, bending or twisting; allowed frequent (2.5-5.0 hours) standing; and restricted to occasional (1-2.5 hours) work above shoulders.

Dr. Carlson further noted that Claimant should avoid repetitive motion of the lumbar spine. (CX 8-14). *See also* (CX 9-6)(Employer's receipt and printout of Claimant's restrictions).

Light Duty Employment

An employer can establish the existence of suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker, supra*. Employer argues that it met this burden by returning Claimant to the same job he was performing prior to his April 1999 surgery. Essentially, Employer states that both Claimant and his treating physician described this job at various times as appropriate and that it is a job which his physician approved at one time. (EX 7-5, 6,

[13] Although Employer suggests that this is a surprising addition to Claimant's restrictions, the court takes note that as early as June 17, 1999, Dr. Trieshmann was recommending that Claimant elevate his legs. (CX 5-14),(EX 7-14).

16). Therefore, Employer argues, but for Claimant's unrelated back impairment, he could return to his long standing light-duty job.

Claimant returned to work on September 28, 1999. However, Dr. Trieshmann's notes four days earlier on September 24, 1999, indicate that the Claimant was not returned to work on that date as "the yard did not have light duty fitting his restrictions." (EX 7-16). Dr. Trieshmann's restrictions, effective September 24, 1999 through November 24, 1999 included: lifting over 25 pounds, only to be carried 100 feet; no climbing vertical or inclined ladders, crawling kneeling or squatting; only stairs necessary to get to and from the job site; and only occasional (1-2.5 hours) standing. (EX 7-32).

Claimant testified that when he returned to work on September 28, 1999, he was returned to his regular duties, not light duty within his restrictions. As Claimant explains: "I was still putting...making brackets and things." (TR. at 27-28). Claimant testified that the job had not been modified for him at all when he returned to work, and that he had problems performing those duties. (TR. at 28). Specifically, Claimant testified "I would bend down. We had to pick up plates, you know. A plate weighs about 25 to 30 pounds, and put it on the table and put them together." *Id.* Claimant credibly testified that he had pain in both his knees and back when he would lift and bend to pick up things. *Id*. The Claimant worked only for two days at this regular duty job, when he experienced back pain in the parking lot on the way to his car. (Tr. 28). It was after this incident, that he returned to see Dr. Acosta and has not returned to work with the Employer. (EX 3-54).

Employer relies heavily on the fact that Claimant was returned on September 28, 1999, to the same job he had prior to his April 1999 surgery. Employer's explanation for the return of the Claimant to this regular duty job was that Dr. Trieshmann had found that this job was a very appropriate occupation for him. However, that statement by Dr. Trieshmann was made over a year earlier and prior to Claimant's surgery. (EX 7-5,6,16), (TR. at 32, 53). To the contrary, Dr. Trieshmann had stated only four days earlier, on September 24, 1999, that the Claimant had not been returned to work as no light duty was available. Aside from Claimant's permanent restrictions from 1994 (no prolonged kneeling crawling or squatting and the opportunity to change positions frequently(CX 9-1)), Claimant appears to be under no additional restrictions prior to his 1999 surgery. *See generally* (EX 7)(Dr. Trieshmann's records, including work restrictions). After the 1999 surgery, there are additional restrictions on lifting.

The Employer argues the Claimant's (pre-April 1999) job, to which he was returned on September 24, 1999, constitutes light duty work. As the Employer bears the burden of proving suitable alternate employment, the Employer must prove by a preponderance of the evidence that this job complied with Claimant's physical restrictions as given by Dr. Trieshmann on September 24, 1999. Employer introduced no evidence as to what Claimant's duties were on September 28, 1999. Therefore, the Claimant's testimony (that he had to bend down, pick up plates weighing 25 to 30 pounds, put them on the table and put them together and that this caused him pain) is unrebutted. Upon consideration of this credible testimony, the September 24, 1999, statement by Dr. Trieshmann, and Employer's lack of evidence regarding the duties and suitability of this position, I find that Employer has not proven by a preponderance of the evidence that Claimant's (pre-April 1999) regular duty job

complied with Claimant's work restrictions given on September 24, 1999. Therefore, I find that the job Claimant returned to on September 28, 1999, was not light duty work and does not constitute suitable alternate employment.

Labor Market Survey

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job opportunities to be realistic, Employer must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). The employer must produce evidence of realistically available job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions within his local community. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984).

In *Universal Maritime Corporation v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997), the Fourth Circuit held that an employer meets his burden by "demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions to fill out the qualifications for performing such jobs." The Court further stated that the burden imposed is parallel to that required by other compensation schemes which rely on standard occupational descriptions, including those provided by the DICTIONARY OF OCCUPATIONAL TITLES (hereinafter "DOT"). *Id.*

Finally, when referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform." *Lentz v. Cottman Company*, 852 F.2d 129, 131 (4th Cir. 1988). According to the Court, "[i]f a vocational expert is able to identify and locate only one employment position, it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id*.

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached maximum medical improvement and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991), that maximum medical improvement "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that "...It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." *Id*.

In the instant case, Employer has submitted a labor market survey performed by Mr. William

Y. Kay, a vocational consultant, of Resource Opportunities, Inc. ("ROI"), as evidence of suitable alternate employment. (TR. at 53). Mr. Kay has a degree in Psychology and worked for the State of Virginia as a Rehabilitation Counselor from 1967-1996. *Id.* He has worked in the private rehabilitation business for about two years dealing with labor market surveys and vocational evaluations. *Id.* Although Mr. Kay testified that he received a letter from the Office of Workers' Compensation Programs stating that he was approved to be certified to provide vocational services, he did not actually get the certification. (TR. at 110). The following exchange regarding Mr. Kay's qualifications ensued:

> Q: For the OWCP certification, you used to be OWCP certified?
>
> A: CRC certification[14] – I've never been OWCP certified. Well I was working for the State for so many years. It's just recently that I've been in the business of dealing with Workers' Comp. on this level.

(TR. at 113). Mr. Kay performed a labor market survey from the date of October 5, 1999 until he completed his report on November 22, 2000, in order to establish what, if any, employment appropriate for Claimant was available. (*Id*. at 56-57). *See also* (EX 12)(Mr. Kay's labor market survey results); (EX 20)(job descriptions signed by the employers listed in the survey); (EX 21)(job descriptions signed and approved by Dr. Carlson).

Mr. Kay considered Claimant's educational background and employment history, as well as the results of his vocational testing of Claimant in administering his survey. Mr. Kay preformed tests on Claimant and, through a computer program, obtained corresponding grade levels for Claimant's abilities. The results he obtained were: verbal, less than sixth grade, quantitative or math part was a sixth grade level, composite skills were less than sixth grade. (TR. at 84), (EX 12-7). Also, in reviewing Claimant's high school records, Mr. Kay noted that he graduated 38th out of 68 students, in the 3rd quartile. (TR. at 84-85), (CX 16-3). However, in those same records, there was a score of 68 noted for an intelligence test. (CX 16-4). That score, according to Mr. Kay, would probably be borderline range, "a little below the average... Between the upper level of possibly slow learner or borderline retarded and borderline normal." (TR. at 86).[15] Mr. Kay also noted that, according to his analysis, Claimant scored highly in abilities or skills in spatial perception, motor coordination, and manual dexterity. (EX 12-7). He also listed several transferable skills, including the ability to count and make change, knowledge of local geographical area, and ability to work and communicate with others to accomplish a given task. (EX 12-8, 9).

Mr. Kay also considered Claimant's medical restrictions in performing his survey. The

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[14] Although no evidence has been entered as to what CRC represents, and Mr. Kay's Curriculum Vitae is not available to this court, based upon the organizations listed on Mr. DeMark's Curriculum Vitae, it is assumed that CRC represents the National Commission on Rehabilitation Counselor Certification.

[15] According to Mr. DeMark, *infra*, however, a score of 69 is an automatic listing of disability under the Social Security Guidelines, and a score of 68 places one in the category of mentally retarded. (TR. at 120).

restrictions he considered, however, apparently did not include any of Dr. Trieshmann's restrictions for Claimant's knees. Mr. Kay relied on a response from Dr. Carlson to Mr. DeMark dated October 16, 2000, listing Claimant's permanent restrictions as no lifting over 10 pounds, and walking, lifting, bending, squatting climbing, kneeling, twisting, and standing to 1 hour. (EX 12-4). Prior to these restrictions, Dr. Carlson issued temporary restrictions on October 9, 2000 which Mr. Kay also considered. These restrictions included no lifting over 20 pounds, no climbing ladders, no crawling, kneeling, squatting, bending or twisting, frequent standing and stair climbing, occasional work above the shoulders, and avoiding repetitive motion of lumbar spine. (EX 12-5). Finally, Mr. Kay also considered the permanent knee restrictions issued by Dr. Reid on March 2, 1994. Those restrictions included were no prolonged kneeling, crawling, or squatting and work which allows Claimant to change position frequently. *Id.* While Mr. Kay did opine that Claimant needed vocational rehabilitation counseling, in agreement with Dr. Carlson (CX 8-18), he was not authorized by Employer to provide that service. (TR. at 82-83).

To rebut this study, Claimant offers the testimony and report of Francis Charles DeMark, Jr.,[16] of Coastal Vocational Services, Inc., a certified rehabilitation counselor[17] and case manager.[18] Mr. DeMark reviewed ROI's records, the job descriptions prepared by Mr. Kay, the corresponding job descriptions in the DOT, the results of his own vocational testing of Claimant, and Claimant's medical, social and employment history in formulating his opinion. According to Mr. DeMark, Dr. Trieshmann had, at this time, restricted Claimant to light duty, including no ladder climbing, limited stair climbing, and limited standing of one to two and one half hours maximum. (CX 11-1). He reported that Dr. Carlson's restrictions for Claimant's back injuries involved no lifting of more than twenty pounds, no crawling, kneeling, squatting, bending, or twisting, as well as limited standing and limited work above the shoulder. After performing vocational tests of Claimant, Mr. DeMark reported:

> [Claimant tested as] reading on a second grade level, spelling on a second grade level, and performing arithmetic on a forth grade level. Intelligence testing showed that his score would be considered "borderline." Manual dexterity testing indicates that he has poor dexterity.

(CX 11-2). Claimant scored a 77 on the intelligence test administered by Mr. DeMark. (TR. at 121). As discussed *supra*, this is not a normal or average score, it is considered "borderline." According to Mr. DeMark:

> And by the way, every one of the jobs that Mr. Kay lists, if you analyze it using the

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[16] Mr. DeMark's Curriculum Vitae is in evidence at CX 11-26 and 11-27.

[17] Mr. DeMark has been certified by the National Commission on Rehabilitation Counselor Certification since 1982 and by the United States Department of Labor, Office of Workers' Compensation Division of Vocational Rehabilitation since 1983. (CX 11-26).

[18] Mr. DeMark has been a certified case manager by the Certification of Insurance Rehabilitation Specialists Commission since 1993. (CX 11-26).

> DOT, it requires an average learning ability, and under aptitude, that's called general learning ability, each job requires a classification III which is the 34 to 66 percent which would correspond to average intelligence.

(TR. at 128). Mr. DeMark also opined that Claimant is borderline functionally illiterate, meaning that although Claimant can read and write, he does not really have the ability to communicate with people in terms of reading or writing or an ability to understand and follow written instructions or directions. (TR. at 117-118). Mr. Kay does not agree. (TR. at 86).

Mr. DeMark also noted that Claimant had no transferrable skills. (TR. at 123). In particular he disagrees with Mr. Kay's definition of communications skills. He testified:

> [B]eing able to talk and converse is not a transferrable skill. That's not a significant vocational skill. [Some examples of communications transferrable skills are t]he use of a computer. The idea of being able to take shorthand, again typing – those would be communications skills....

(TR. at 124). Despite Claimant's experience in supervising and instructing people at the Shipyard, Mr. DeMark does not believe Claimant has transferrable communication skills. Rather, Mr. DeMark focused on the significant experience that Claimant had in everything he taught and supervised. (TR. at 149-50). Finally, Mr. DeMark opined that Claimant would not be successful in his efforts to find work, due to the combination of his vocational deficits and his age.[19] (CX 11-3), (TR. at 125).

In performing his labor market survey, Mr. Kay provided some general and some specific job descriptions to Dr. Carlson in order to get his approval of the physical qualifications. (TR. at 108). Dr. Trieshmann did not respond, apparently, to Mr. Kay's request for approval of the jobs. *Id.* Further, Mr. Kay did not incorporate Dr. Trieshmann's restrictions requiring Claimant to elevate his legs for thirty minutes every three hours, as Mr. Kay was apparently unaware of this restriction. (TR. at 89). Mr. Kay stated that he primarily used the same restrictions that Mr. DeMark used, the lowest that he had. (TR. at 89). Dr. Trieshmann did not formally note that Claimant needed to elevate his feet periodically until the restrictions issued on October 17, 2000. *Id.* Mr. Kay testified that this restriction would not disqualify many of the jobs he found, specifically the security guard positions, the dispatcher position, and the position at Goodwill. (TR. at 89-90). *See* discussion *infra* regarding specific available employment.

Finally, Mr. Kay did not use the appropriate DOT descriptions of many of the positions he was advocating. While this is not an issue for the jobs which Mr. Kay obtained specific descriptions and visited the job sites, his failure to use the appropriate DOT descriptions will be considered in those

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[19] Mr. DeMark was confronted by past testimony in two cases involving past claimants with similar intelligence scores and age as Claimant. In those cases, Mr. DeMark explained, other factors, such as questions regarding test scores, experience with the public, the job market, and transferrable skills were considered. (TR. at 136-43, 145-48, 154-55).

positions for which general standard occupational descriptions were used, because Mr. Kay stated in his report that the DOT was considered as part of his analysis. (EX 12-4). Mr. DeMark did, however, utilize the DOT but, although he has spoken with the employers listed in the survey, has not spoken with them regarding Claimant. (TR. at 143-44).

To summarize the survey he performed for Claimant, Mr. Kay states:

> [t]he survey indicates there have been and there currently are viable employment opportunities available to [Claimant] with an average wage of $6.25 per hour or $250.00 per week and a residual wage earning capacity as high as $8.50 per hour or $340.00 per week. These jobs are entry level and do not require transferable skills.

(EX 12-2)(TR. at 74). After interviewing and testing Claimant, Mr. Kay focused on three occupational areas in which he stated suitable jobs for Claimant were available: customer service, entry level; unarmed security work; and driving. (EX 12-9). All of the employers listed indicated that they were hiring at the time Mr. Kay contacted them. (EX 12-10 through 13). Mr. Kay opined that these types of jobs are routinely available in the local labor market. (TR. at 74). *See also* (EX 12-24 through 74) (listings of similar job openings in a local newspaper from October 5, 1999 through the date of the survey, November 22, 2000).

Customer Service- Entry Level

According to Mr. Kay, based upon the tests he performed, Claimant's restrictions and educational background, Claimant is capable of performing entry level customer service jobs. (EX 12-9, 10). Mr. Kay specifically identified Claimant's pleasant personality and the fact that he has a high school diploma as reasons for choosing this type of position. Mr. Kay contacted three employers in this area to identify specific job availability: Cashier, Central Parking, Norfolk, Virginia; Donation Center Attendant, Goodwill Industries of Hampton Roads,[20] Newport News, Virginia; Dispatcher, Associated Cabs, Inc., Newport News, Virginia. (EX 12-10, 11).

Associated Cabs, Inc.-Dispatcher[21]

The duties listed in Mr. Kay's analysis of this job are answering incoming calls, dispatching cabs using radio communication equipment, and emptying the office trash can at the end of the shift.

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[20] Although Claimant's counsel asserts that Employer no longer relied on the Goodwill Industries job as suitable alternate employment, that is simply incorrect. *See* Employer's Brief at 21-22. *Contra* Claimant's Brief at 37.

[21] Both Mr. DeMark (Claimant's expert) and Mr. Kay (Employer's expert) agreed that this position is listed in the DOT as: **913.367-010 TAXICAB STARTER** (motor trans.) alternate titles: cab starter; dispatcher

> Dispatches taxicabs in response to telephone requests for service: Maintains operational map showing location of each cab. Contacts drivers of assigned sector by radio or telephone to relay request for service. Logs calls relayed to each driver and address of patron. Arranges for relief cab or driver. GOE: 07.04.05 STRENGTH: S GED: R3 M2 L2 SVP: 3 DLU: 77.

No high school diploma or previous experience is required and it is noted that all duties are performed while seated at a workstation. (EX 12-14). The lifting required for this job is around 3 pounds. *Id.* This job pays $6.00 an hour and offers 16-40 hours per week. *Id.* While Dr. Carlson did approve the Dispatcher position, the description he signed did not indicate that Claimant would, on occasion, be required to drive a cab. In the application signed by the employer, however, the wages were noted to be $5.75 per hour and the hours were 16 with potential full time. (EX 20-12). Also, as Claimant pointed out in his brief, there was a slight semantic difference in the two descriptions. In the copy provided to Dr. Carlson, standing and walking were not required but may be done by choice. (EX 21-1). However, in the copy approved by Associated Cabs, standing and walking are required "as needed." (EX 20-12). Further, the wage was noted on this job description as $5.75 per hour. *Id.* The lifting requirement was noted as "[t]rash can (5-10 lbs)." *Id.* It is noted that all duties will be performed while seated at a work station. *Id.* The job description, with the "by choice" language for standing and walking, was approved by Dr. Carlson. (EX 21-1). *See* Claimant's Brief at 37.

Mr. Kay described this position in his testimony:

> It is primarily sitting in a very small office. The building is secured. It's a matter of answering incoming telephone calls for people who wish to have cab services. You write down the information on a ... where they have to go and the time, and then it's a matter of using some type of communication device like a 2-way radio to notify the driver of the cab to pick a person up. There's no computer skills required for this. It's strictly just use the telephone, write down the information, and then have the car go and pick him up.

(TR. at 59). Mr. Kay also testified that Associated Cabs has hired a new person to be in charge with the title of Chief Dispatcher. This new person began in December. (TR. at 60). ROI has placed people in this position previously, people that did not have a high school diploma. *Id*.

Claimant testified that he did not qualify for this specific position because he was not familiar with the area the cabs served, specifically the Denbeigh area.[22] (TR. at 38). Mr. Kay did not agree with this disqualification, testifying: "I don't think he would be disqualified. They offer training there. They have never told me that they disqualify people. There is a map there that other people can use." (TR. at 59).

Claimant's testimony was, however, corroborated by Mr. DeMark's testimony. Mr. DeMark testified that he was familiar with this particular company and that they like to have people that know the area and can give adequate directions to its drivers. (TR. at 130). Further, Mr. DeMark testified that this was not an appropriate job for Claimant according to the DOT description because it requires

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[22] This notation was made on Claimant's job search records as well. (CX 14). Claimant testified that the person he actually talked to at the interview or inquiry wrote in the information under the category "outcome results." (TR. at 38). In this instance, the outcome results category indicated that Claimant "did not qualify." (CX 14-2, 4). *See also* (TR. at 38).

average intelligence.[23] Mr. DeMark also noted that this position would involve working with the public and looking up directions. He does not believe that Claimant has the ability to perform this combination of tasks. (TR. at 130). Again, according to Mr. DeMark, the DOT for this position generally requires average intelligence and, according to Mr. DeMark, computerized systems are generally used. *Id*.

Based strictly upon Claimant's *physical* restrictions, I find that this job is appropriate. Claimant would, it appears, be able to elevate his foot as Dr. Trieshmann requires. However, the job is not appropriate given Claimant's intellectual abilities, as his IQ has been noted to be "borderline" not average. Based upon Claimant's testimony, corroborated by his job search records and Mr. DeMark's testimony, he was not qualified for this job. Therefore, I find that the position of Dispatcher for Associated Cabs does not constitute suitable alternate employment.

Goodwill Industries of Hampton Roads- Donation Center Attendant[24]

As a donation center attendant for Goodwill Industries of Hampton Roads, Claimant would be responsible for providing donors with tax receipts; providing donors with information about Goodwill Industries; greeting individuals in a pleasant and professional manner; accepting donations and placing and sorting items in the donation center; thanking each donor for their donation; keeping donation center clean and free of debris; securing donation center at end of shift; being sure the donation center is not left unattended; and maintaining records of all donated merchandise. (EX 12-15),(EX 20-1). Claimant would be required to work with arms extended at shoulder level for less than two hours, he would have to stoop for "minutes per day," standing and walking are noted to be .5 hours per day with "As Needed" noted. (EX 12-15). Finally, under the 1 hour heading, occasional pushing or pulling is noted. *Id.* Claimant may also be required to lift up to 20 pounds. *Id*.

While, on the description included in the labor market survey, it is noted that Goodwill Industries will make accommodations as needed (*Id*.), on the description signed by Claudette Fite (Goodwill representative), it is noted only that Goodwill Industries will make accommodations on the lifting requirement. (EX 20-1). In addition, the copy of the job description signed by Mrs. Fite noted that standing and walking were done "as needed," however, there is what appears to be a less than 1 hour notation for these categories. *Id.* Other categories were, Claimant would be required to do less than 1 hour working with body bent over at waist, stooping, and pushing or pulling (to be able to push and pull bins on wheels and before the bin gets full). *Id.* Claimant would not be required to crawl,

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[23] Mr. DeMark testified that all of the positions identified by Mr. Kay in his labor market survey require average learning ability and intelligence. (TR. 128).

[24] Both Mr. DeMark (Claimant's expert) and Mr. Kay (Employer's expert) agreed that this position is listed in the DOT as: **222.387-054 SORTER-PRICER** (nonprofit org.) alternate titles: pricer-sorter

> Sorts used merchandise received from donors and appraises, prices, wraps, packs, and allocates merchandise for resale in retail outlets of nonprofit organization and maintains related records. Discards unsalable items or sets them aside for salvage or repair. May make minor repairs on damaged merchandise. May be designated according to merchandise sorted as Book Sorter (nonprofit org.); Clothing Sorter (nonprofit org.); Jewelry Sorter (nonprofit org.); Wares Sorter (nonprofit org.). GOE: 05.09.03 STRENGTH: L GED: R3 M2 L2 SVP: 5 DLU: 77.

kneel or climb ladders. *Id.* On this description the wage is noted as $5.25 per hour and the hours per week are listed as 37.5. *Id.* The job description approved by Dr. Carlson is the description included in the original labor market survey. (EX 12-15),(EX 21-2).

In a deposition taken May 3, 2001, Mr. Billy K. Fite was deposed regarding the job description of a donation center attendant for Goodwill Industries of Hampton Roads. (CX 19-4). Goodwill Industries apparently has two locations, one run by Mr. Fite and one run by his wife, Mrs. Claudette Fite. *Id.* at 5. His wife signed the job descriptions submitted as EX 20-1. When asked what a donation center attendant would do, Mr. Fite testified:

> They meet the public. Let me start at the beginning. The little sheds we have at Wal-Mart stores and people want to drop stuff off, greet them, assist them getting the stuff in the shed if they need help and give them a receipt.

Id. at 6. Mr. Fite further testified that while sometimes large items are dropped off, he has a lot of people with restrictions working for him and "Everybody knows if it's beyond your restrictions not to do it, to ask the people to assist putting it in the shed." *Id*. at 7. If the donors cannot help the attendants, it doesn't go to the shed, the donor will bring it to one of the stores or someone will be sent to pick it up. *Id.* Paperwork is minimal and includes a receipt with the donor's name, address, phone number, and what they donated. *Id.* Mr. Fite also testified that he mainly hires disabled people, as "that's what Goodwill is all about." *Id.* at 11. Age is not an issue in hiring, he hires both young and older people. *Id.* at 12.

Mr. DeMark testified that he did not believe Claimant could perform this job. Mr. DeMark's main concerns appear to be the drop off of heavy donations and the outdoor element. (TR. at 131).

Based upon Mr. Fite's specific testimony, this particular position is within the restrictions of Claimant's knee injuries. In fact, it also appears to be within Claimant's back restrictions. While it appears that the job available with Mrs. Fite would involve greater lifting, pushing and pulling and would perhaps exceed Claimant's restrictions, the job with Mr. Fite does not offer any such problems. As in *Tann*, this employer specifically stated his willingness to hire someone with Claimant's disabilities, and he has previously hired disabled employees. *Newport News Shipbuilding and Dry Dock Co., v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

Therefore, I find that the specific job as described by Mr. Fite, would be considered suitable alternate employment because his specific description allows for Claimant's restrictions, and he has indicated he is willing to hire someone with Claimant's restrictions. However, the general category of jobs (sorter-pricer) is not suitable, as it requires average intelligence (TR. 128) and is considered light duty work.[25]

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[25] The DOT strength rating of "L" is described as:

L-Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move

Central Parking Systems- Cashier[26]

As a cashier for Central Parking Systems, Claimant would receive cash from customers in payment for parking. Claimant would be required to make change in whole dollar amounts, issue receipts and/or tickets to customers, and perhaps operate the ticket dispensing machine. While the employer provides training, a high school diploma or GED is required. (EX 12-16). According to the DOT, in addition to the tasks listed, a cashier is required to record amounts received and prepare a report of transactions and verifies the totals shown on the cash register with the cash on hand. (CX 11-9). While most physical activities are not required, Claimant would have to walk, intermittently for about an hour and may have to lift less than 10 pounds. *Id.* This job pays $5.25 per hour and offers 40 hour weeks. *Id*.

Again, Claimant points out that the job description provided to Dr. Carlson differs from the description signed by the Central Parking Systems representative. *See* Claimant's Brief at 39. Dr. Carlson approved a job description that required standing and sitting as tolerated and walking intermittently for one hour a day. (EX 21-3). The job description approved by Central Parking Systems states that the job requires four hours of standing, four hours of sitting, with no notation as to how much walking is required. (EX 20-8). Mr. DeMark also states that this is not a suitable job for

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objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

[26] Both Mr. DeMark (Claimant's expert) and Mr. Kay (Employer's expert) agreed that this position is listed in the DOT as: **211.462-010 CASHIER II** (clerical) alternate titles: cash clerk; cashier, general; cashier, office; ticket clerk.

> Receives cash from customers or employees in payment for goods or services and records amounts received: Recomputes or computes bill, itemized lists, and tickets showing amount due, using adding machine or cash register. Makes change, cashes checks, and issues receipts or tickets to customers. Records amounts received and prepares reports of transactions. Reads and records totals shown on cash register tape and verifies against cash on hand. May be required to know value and features of items for which money is received. May give cash refunds or issue credit memorandums to customers for returned merchandise. May operate ticket-dispensing machine. May operate cash register with peripheral electronic data processing equipment by passing individual price coded items across electronic scanner to record price, compile printed list, and display cost of customer purchase, tax, and rebates on monitor screen. May sell candy, cigarettes, gum, and gift certificates, and issue trading stamps. May be designated according to nature of establishment as Cafeteria Cashier (hotel & rest.); Cashier, Parking Lot (automotive ser.); Dining-Room Cashier (hotel & rest.); Service-Bar Cashier (hotel & rest.); Store Cashier (clerical); or according to type of account as Cashier, Credit (clerical); Cashier, Payments Received (clerical). May press numeric keys of computer corresponding to gasoline pump to reset meter on pump and to record amount of sale and be designated Cashier, Self-Service Gasoline (automotive ser.). May receive money, make change, and cash checks for sales personnel on same floor and be designated Floor Cashier (clerical). May make change for patrons at places of amusement other than gambling establishments and be designated Change-Booth Cashier (amuse. & rec.). GOE: 07.03.01 STRENGTH: L GED: R3 M2 L2 SVP: 2 DLU: 81

Claimant. Mr. DeMark is specifically concerned about the math test that the city uses as part of the screening. He stated that it was not unusual for cashiers to have to take a math test. Based upon his testing of Claimant, he does not feel that he would do well at balancing his money at the end of the day, comparing it to the receipts, and explaining any shortages, although he could probably make change in whole dollar amounts. (TR. at 131-32).

While this job does appear to be within Claimant's physical restrictions for his knee, the issue here is his intellectual abilities. While Claimant did graduate from high school, intelligence tests place him at the borderline range. Mr. DeMark's testing did show that the Claimant is capable of basic addition and subtraction. (TR. at 152). Mr. DeMark still opines, however, that Claimant would have trouble performing the job duties required. He testified:

> [I]t's not the idea of counting the money at the end of the day. It's the idea that again that if he's off by $2.00, that's an error, and no, it's not the idea that he can't count, it's the idea that with his math skills the way they are, I think it's a good chance he's going to make an error during the day and again, his drawer at the end of the day is not going to add up.

(TR. at 153). Therefore, a job which requires him to take and pass a math test and to balance a cash drawer at the end of the day, reconciling the contents of the drawer with receipts seems untenable. Therefore, based upon Claimant's intelligence and math test scores, from both of the vocational experts, and the DOT description of this job, I find that this position does not constitute suitable alternate employment. Further, even if this position did constitute suitable alternate employment, Claimant credibly testified that he applied to Central Parking, but that he was not offered a job. (TR. at 40).

Unarmed Security [27]

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[27] Both Mr. DeMark (Claimant's expert) and Mr. Kay (Employer's expert) agreed that this position is listed in the DOT as: **372.667-034 GUARD, SECURITY** (any industry) alternate titles: patrol guard; special police officer; watchguard.

> Guards industrial or commercial property against fire, theft, vandalism, and illegal entry, performing any combination of following duties: Patrols, periodically, buildings and grounds of industrial plant or commercial establishment, docks, logging camp area, or work site. Examines doors, windows, and gates to determine that they are secure. Warns violators of rule infractions, such as loitering, smoking, or carrying forbidden articles, and apprehends or expels miscreants. Inspects equipment and machinery to ascertain if tampering has occurred. Watches for and reports irregularities, such as fire hazards, leaking water pipes, and security doors left unlocked. Observes departing personnel to guard against theft of company property. Sounds alarm or calls police or fire department by telephone in case of fire or presence of unauthorized persons. Permits authorized persons to enter property. May register at watch stations to record time of inspection trips. May record data, such as property damage, unusual occurrences, and malfunctioning of machinery or equipment, for use of supervisory staff. May perform janitorial duties and set thermostatic controls to maintain specified temperature in buildings or cold storage rooms. May tend furnace or boiler. May be deputized to arrest trespassers. May regulate vehicle and pedestrian traffic at plant entrance to maintain orderly flow. May patrol site with guard dog on leash. May watch for fires and be designated Fire Patroller (logging). May be designated according to shift worked as Day Guard (any

Claimant is also capable of being an unarmed security guard according to Mr. Kay, again based upon the tests he performed, Claimant's restrictions and educational background. (EX 12-11). Mr. Kay specifically identified Claimant's educational level, temperament, and employment experience as reasons for choosing this type of position. Mr. Kay contacted prospective employers in this area to identify specific job availability and identified three possibilities: Security Services of America, Newport News, Virginia; Wackenhut Corporation, Newport News, Virginia; James York Security, Williamsburg, Virginia. (EX 12-11, 12).

As was made clear at the hearing, all of these jobs require the passage of a state test for security guards; the test has a ninety-eight percent passage rate. (TR. at 150-51). *See also* (CX 20-9, 11)(owner of James York security describing the test as open book, easy, and stating that everyone passes it after the class). Mr. DeMark, however, testified that he had reservations as to whether or not Claimant could pass the test, although he did not actually give Claimant a sample test. (TR. at 133), (TR. at 151). Another concern raised by Mr. DeMark regarding this category of jobs was the issue of confrontation, writing reports, and environmental factors such as snow and ice. *Id.* According to Mr. Kay's information, even during the night shift these types of jobs would not require Claimant to be involved in any type of physical confrontation. (TR. at 94-96). According to the DOT description, however, a security guard may be required to write reports and respond to emergencies. (CX 11-11, 12, 13).

I find the testimony of Mr. DeMark to be more persuasive than the testimony of Mr. Kay regarding these positions. Mr. DeMark testified that each of these positions are guard positions, therefore, they necessarily require one to be able to respond to emergencies, such as fire and theft. (TR. at 132-33). Even the testimony of Mr. Allen, a former hiring office of one of these companies, discussed *infra*, addresses this possibility which Mr. Kay completely discounts. Therefore, I find that the category of "unarmed security" is not suitable alternate employment for the Claimant. However, the three specific jobs identified will be discussed, as their duties may differ.

A. Security Services of America

On a job analysis form provided by Mr. Kay, the job as an unarmed security guard for Security Services of America, indicates that Claimant would sit in a car and monitor a gate, open gates to allow fishermen to enter the area, log people and vehicles in and out of the area; and walk around enclosed area once during a shift. The walk typically takes around fifteen minutes to complete. Claimant may walk at his own pace and rest as needed. In this job, Claimant would be required to lift and carry a flashlight, clipboard, radio or phone. (EX 12-17). This job pays $6.00 per hour and offers 32-40

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industry); area guarded as Dock Guard (any industry); Warehouse Guard (any industry); or property guarded as Powder Guard (construction). May be designated according to establishment guarded as Grounds Guard, Arboretum (any industry); Guard, Museum (museums); Watchguard, Racetrack (amuse. & rec.); or duty station as Coin-Vault Guard (any industry). May be designated Guard, Convoy (any industry) when accompanying or leading truck convoy carrying valuable shipments. May be designated: Armed Guard (r.r. trans.); Camp Guard (any industry); Deck Guard (fishing & hunt.; water trans.); Night Guard (any industry); Park Guard (amuse. & rec.). GOE: 04.02.02 STRENGTH: L GED: R3 M1 L2 SVP: 3 DLU: 88

hours per week. *Id.* The position letting fishermen in and out of the area is a specific job description. (TR. at 104).

Again, Claimant points out a discrepancy in the job descriptions provided to the employer and to the doctor. (Claimant's Brief at 41). The job description that Dr. Carlson approved stated that Claimant would be required to walk for 15 to 30 minutes one time during a shift. (EX 21-4). Security Services of America provided two specific job descriptions. The job description that related to the description signed by Dr. Carlson required walking for two hours per shift. (EX 20-11). The other description provided for walking 20 to 30 minutes three times per an 8 hour shift. (EX 20-10). As discussed *supra*, Claimant would be obviously be required to respond to emergencies in this situation. Claimant would also have to take and pass the state security guard examination in order to qualify.

Therefore, I find that this job with Security Services of America does not constitute suitable alternate employer for the Claimant. Further, even if this position did constitute suitable alternate employment, Claimant credibly testified that he applied for the specific job described here, but was not given an offer. (TR. at 39-40).

B. Wackenhut Corporation

On a job analysis form provided by Mr. Kay, the job as an unarmed security guard for Wackenhut Corporation, indicates that Claimant would be stationed in an administration building, seated at a desk. He would check badges of employees entering the building, and check the bags and cases of employees leaving the building. Monitoring employees as they walk to their cars in the parking lot is also a requirement of this job. Finally, Claimant would also have residential patrol. As such he would drive a company car through designated residential areas. (EX 12-18). No lifting was noted as required for this job. *Id.* This job pays $6.25 per week and offers 40 hours per week. *Id.* This is a general, not a specific, job description. (TR. at 104). Dr. Carlson approved this job description as meeting Claimant's back restrictions. (EX 21-5).

In a deposition dated May 3, 2001, Jimmy Allen, an employee for Wackenhut testified that he was formerly a "Major" in charge of hiring for Wackenhut from February through November of 2000. However, in December of 2000 he stepped down and became a regular security officer. (CX 21-5). The job description in evidence was not signed by Mr. Allen, rather, it was signed by Major Wilkerson, who relieved him from his duties as Major. (CX 21-6). Mr. Allen had not seen the particular job duty description that is in evidence. *Id.* Mr. Allen described a job in which the duties vary with site and client demand. (CX 21-7). He testified:

> [Duties d]epend on the site, shift, our clients, what duties he wants to perform, what checks, patrol, whether it be a car patrol, foot patrol or monitoring. It all depends on what site we have open at that particular time, the person I'm going to hire, what the job entails, who can fit it. Depends on their ability. ... We try to hire them for a particular site. Now, it all depends on that, too. If I have a good man, physical[ly] fit and I can rotate him I rotate him. I let him know right up front I'm going to hire you for

> this but I will need you for this. ... It all depends on your ability and how far you want to go.

(CX 21-7). Mr. Allen also testified that he prefers hiring older workers as they are more likely to stay with the company. (CX 21-9). Regarding physical limitations, Mr. Allen testified that "It all depends." (CX 21-9). He specifically referred to what sites had openings and the limitations of the applicant as factors to consider in hiring applicants. *Id.* Finally, Mr. Allen was asked about the job description in evidence. He testified that the address provided is for Wackenhut's office. (CX 21-10). While initially confused by the form, he stated that he would place someone with the restrictions listed in car patrol or a position where the guards monitor at a desk. (CX 21-11). Mr. Allen described various duties and shift times that correspond with different sites. (CX 21-11 through 14). Finally, Mr. Allen hesitated to say that a physical confrontation would never be necessary in an unarmed guard position, however, he testified that a physical attack had not occurred, that he was aware of in the three years he had been with the company. (CX 21-15). Depending on the site, it could be an issue, he testified:

> It depends on the site. It would have to be something like a bank, somewhere [i.e. surprising a burglar, etc.]. It all depends on the site that you have. To say something is going to happen, no, I can't put that on you. If I say nothing is ever going to happen, that would be lying. We never know. Even walking down the street something could happen to you. You never know.

(CX 21-15, 16). In this case, it appears Claimant would be hired for a specific site.

A former hiring employee of this company, Mr. Allen, refused to rule out the possibility of confrontation, stating that it depends on the site. The site you get depends on your abilities, and if he has someone that he can rotate, he will. As with each of the jobs in this category, Claimant would have to deal with emergency situations as well as take and pass the state test for security guard. In addition, Claimant would have trouble propping up his feet periodically while driving car patrol, although it may be possible at a desk job.

Upon consideration, I find that the job of unarmed security for Wackenhut Secuity is not suitable alternate employment for the Claimant. Further, even if it were considered suitable, Claimant testified that he applied for this position and there were no openings. (TR. at 38). The company informed Mr. Kay that it did not have an opening at that time, however, they were keeping Claimant's application on file and would reconsider him. (TR. at 67-69).

C. James York Security

On a job analysis form provided by Mr. Kay, the job as an unarmed security guard for James York Security, indicates that Claimant could possibly: monitor an area in an enclosed hotel from a chair in the hall; sit at a desk and monitor people entering or leaving an area; perform a routine check twice an hour, usually requiring 10 minutes each time; will keep a security report; and log people in and out of a building or area. Training will be provided by employer, no experience is required and the employer

is willing to accommodate for disabilities. (EX 12-19). Standing, walking and sitting can be alternated depending on abilities. The lifting requirements are minimal five pounds. *Id.* This job pays $5.35 an hour during training and $6.00 after training is completed. Up to 40 work hours per week are available. *Id.* This is a general, not a specific job description. (TR. at 103). Dr. Carlson approved this job description as within Claimant's back restrictions. (EX 21-6).

The owner of James York Security since January of 2000, William B. Hill, was deposed on May 3, 2001. (CX 20). Mr. Hill testified that when he hires unarmed security guards he does not hire them for particular sites, but rotates them to sites depending on where they are needed. (CX 20-5). He explained that his company has contracts with various businesses and sites and that the duties vary according to the differing demands of the business. (CX 20-5, 20-6). After examining the job description in evidence, he stated that it was just a generic description of the job, not tailored to any specific site. (CX 20-6). Mr. Hill then described some of the various requirements for different sites, including: occasionally removing hotel guests who are creating a disturbance, but not with physical force; check in and out visitors, involving a lot of paperwork; checking hallways and other areas in hotels; and dealing with emergency situations, such as fire, in hotels. (CX 20-7,8, 10).

Based upon this testimony and due in particular to the testimony regarding the nature of some of the duties required by employees of this company at particular sites and the fact that a guard hired for this company is hired on a rotational basis and not for a particular site, I find that this position does not constitute suitable alternate employment. Further, even if this was an appropriate position, Claimant credibly testified that he applied for a position with this company and that they were not hiring. (TR. at 40).

Driving

Finally, Mr. Kay opined that Claimant is also capable of being a driver, according to Mr. Kay, again based upon the tests he performed, Claimant's restrictions and educational background. (EX 12-11). Mr. Kay specifically identified the facts that Claimant has a valid driver's license, his knowledge of the area, and good driving record as reasons for choosing this type of position. Mr. Kay contacted prospective employers in this area to identify specific job availability and identified three possibilities: bus driver, Hampton Schools, Hampton, Virginia; delivery driver, Brake Parts, Hampton, Virginia; bus operator, Hampton Roads Transit, Hampton, Virginia. (EX 12-12, 13). Due to a change in products, the description of delivery driver, specifically lifting requirements, for Brake Parts has been changed and so Employer no longer relies on this position as suitable alternate employment. *See* Harmon depo at 5-6; Employer Brief at 26-27. It is also noted that this position would be excluded due to Dr. Trieshmann's restrictions. (TR. at 106),(Employer's Brief at 21). Further, Employer withdrew their reliance on the Hampton Roads Transit bus driving position, which was not approved by Dr. Carlson. (EX 21-9),(Employer's Brief at 27),(TR. at 80). This leaves only the position of Hampton Schools-Bus Driver to be considered.

Hampton Schools- Bus Driver[28]

As a bus driver for Hampton Schools, Claimant's job duties and requirements would include: a good driving record, maintaining safety at all times while driving city vehicles; following directions to pick-up and deliver children to and from school; document daily trip hours and times; and monitor service and maintenance schedules for school bus. Training would be provided. Claimant would be paid $48.43 per day and the hours would be 25 or more per week. The physical requirements for this job include about 10 minutes of reaching above shoulder height to adjust the mirror or sun visor, and about 5 hours of sitting. In emergency situations Claimant may be required to lift 30 pounds.[29] (EX 12- 20).

When Mr. Kay was asked to elaborate on this lifting requirement he testified "that's assisting somebody off the door at the back of the bus, the emergency door at the back." (TR. at 112). He further testified:

> It's extremely rare from what I've been told that you would ever have an emergency situation that would require you to actually help somebody off the back of the bus. It's a very, very rare event, but that is a requirement, so I didn't list it on that report that they sent in. It said that hardly ever it would be required of a person.
>
> Judge Huddleston: Only when it's necessary to save a child's life.
>
> A: Under those circumstances, probably most of us would have a lot more strength than we realize.

(TR. at 113). Mr. DeMark also raised the possibility of Claimant having to assist handicapped children on and off the bus. (TR. at 134). Dr. Carlson approved this job description. (EX 21-7). This was a specific position, however, the person he spoke with had not signed off on these requirements as of the hearing date. (TR. at 105). As the emergency referred to in this instance does involve rescuing lives

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[28] 913.463-010 BUS DRIVER (motor trans.) alternate titles: chauffeur, motorbus; coach operator Drives bus to transport passengers over specified routes to local or distant points according to time schedule: Assists passengers with baggage and collects tickets or cash fares. Regulates heating, lighting, and ventilating systems for passenger comfort. Complies with local traffic regulations. Reports delays or accidents. Records cash receipts and ticket fares. May make repairs and change tires. May inspect bus and check gas, oil, and water before departure. May load or unload baggage or express checked by passengers in baggage compartment. May transport pupils between pickup points and school and be designated Bus Driver, School (motor trans.). May drive diesel or electric powered transit bus to transport passengers over established city route and be designated Motor-Coach Driver (motor trans.); Trolley-Coach Driver (motor trans.). GOE: 09.03.01 STRENGTH: M GED: R3 M2 L2 SVP: 4 DLU: 81

[29] It is also noted that the strength requirement listed in the DOT for this position is: **M-Medium Work** - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

and/or protecting child passengers who may not be able to help themselves in an emergency situation, I find Claimant's physical restrictions render him an unsuitable candidate for this job, therefore it will not be considered suitable alternate employment. As the other two positions listed in the survey for this category are no longer relied on by Employer, I find that none of the positions in the driving category constitute suitable alternate employment for Claimant.

In conclusion, I have found that the Claimant's former job which he held prior to April of 1999, and to which he was reassigned briefly, does not constitute suitable alternate employment. Further, after carefully examining Claimant's physical restrictions, age, background and the results of his intelligence tests, I find that Claimant is not generally capable of performing any of the categories of jobs listed in the labor market survey performed by Mr. Kay. The only job found to be suitable is that of a Donation Center Attendant for Mr. Fite with Goodwill Industries of Hampton Roads. This job was found to be suitable due to the particular requirements of that specific position and the manager's willingness to hire within Claimant's restrictions. However, this one job is not sufficient to prove suitable alternate employment, as Employer must show a range of jobs. *Lentz*, 852 F.2d at 131. In addition to the jobs listed in the survey, Employer offered local newspaper listings of general sedentary work. (EX 12-24 through 74). The jobs listed share the same flaws as those included specifically within the survey, which have been excluded as suitable employment based upon Claimant's restrictions and abilities. (EX 12-24, 25). Mr. Kay testified:

> These [are] just to show from the Daily Press that there were similar types of jobs and that I tried to get some scattered throughout the period that I was doing a labor market survey, and so it starts just slightly prior to the date that I was given for the labor market survey and goes up to just before I submitted my report.
>
> Q: So in your opinion, are jobs like these that you identified specifically in the labor market survey available routinely in the local labor market?
>
> A: Yes in many cases on here, they were actually the same job.

(TR. at 74). As discussed at length above, the jobs listed in the survey all require average intelligence. The results from two IQ tests, given years apart from each other, show that Claimant falls well below that range. That, in addition to his physical restrictions, render all of the general positions listed unsuitable. The general listings of the same types of positions, if not the same position, are excluded based upon the same reasoning.

Based upon Claimant's IQ test and the physical restrictions for his knees, I find none of the general descriptions of available positions, based upon the DOT ratings, constitute suitable alternate employment for Claimant. Where specific job descriptions were available, I find that only one specific job, that of Donation Center Attendant with Goodwill of Hampton Roads, constitutes suitable alternate employment. That one specific employment opportunity is not sufficient to prove that suitable alternate employment exists.

Therefore, I find that the Claimant is not limited to the statutory schedule of payment for his bilateral knee injuries, as he is permanently and totally disabled.

Order

Accordingly, it is hereby ordered that:

1. Claimant, Joseph N. Daniels, is not entitled to compensation under the Act for the condition of spinal stenosis;

2. Employer, Newport News Shipbuilding and Dry Dock Co., is hereby ordered to pay to Claimant, Joseph N. Daniels, compensation for permanent total disability due to his bilateral knee injuries from October 5, 1999, to the present and continuing, at a compensation rate of $368.07 per week;

3. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

4. Employer shall receive credit for any compensation already paid;

5. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

6. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A
RICHARD E. HUDDLESTON
Administrative Law Judge